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In the Supreme Court of the United States

OCTOBER TERM, 1974

CHESTER SCHABATKA and NORBURN DEAN,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

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NO.

CHESTER SCHABATKA and **NORBURN DEAN**,

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vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

Petitioners, Chester Schabatka and Norburn Dean, respectfully pray that a writ of certiorari be issued to the Appellate Court of Illinois, Third District, to review its decision affirming judgments of conviction in the Tenth Judicial Circuit Court, Tazewell County, Illinois, adjudging petitioners guilty of the offenses of burglary and arson.

Judgments and Opinion Below

On April 17, 1974, the Illinois Appellate Court, Third District, rendered an opinion affirming petitioners' convictions, No. 72-169, reported at 18 Ill.App.3d 635, 310 N.E. 2d 192 (1974). A copy of the Appellate Court's opinion is attached hereto as Appendix A. A petition for leave to appeal to the Illinois Supreme Court, timely filed, was denied on September 27, 1974. (No. 46784) (Appendix B)

Jurisdiction of this Court

The judgment sought to be reviewed (the Illinois Supreme Court's denial of the petition for leave to appeal) was entered on September 27, 1974. This petition for writ of certiorari is filed within 90 days from said denial. Jurisdiction of this Court is invoked under Title 28, United States Code, Sec. 1257(3) and Rule 22 of the Rules of this Court.

Questions Presented for Review

1. Are not petitioners' convictions so lacking in evidentiary support as to render said convictions violative of due process of law?

2. Were not petitioners precluded from presenting their theory of defense to the jury, in violation of their due process rights?

   A. Refusal to instruct on the defense of alibi.

   B. Exclusion of evidence of petitioners' out-of-court statements.

Constitutional Provision Involved

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part that:

"Section 1. . . . [N]or shall any State deprive any person of . . . liberty . . . without due process of law; . . ."

Raising the Federal Questions

Petitioners raised the questions of the insufficiency of the evidence to sustain their convictions, the trial court's improper refusal to instruct on alibi, and the trial court's erroneous exclusion of evidence of petitioners' out-of-court statements in their appeal to the Illinois Appellate Court, Third District, and in their petition for leave to appeal to the Illinois Supreme Court. In each court, they urged the total insufficiency of the evidence, and that the trial court's errors deprived them of a fair trial in violation of due process of law.

Statement of the Case

Petitioners were convicted of burglary and arson, for having set fire to the home of James and Ann Emmons at 115 Fifth Street, South Pekin, Illinois, and for having entered said home with intent to commit arson, on July 23, 1971. After a jury found them guilty, the court sentenced petitioner Schabatka to 2 to 5 years for burglary and 5 to 10 years for arson, sentences to run concurrently, and petitioner Dean was sentenced to 5 to 10 years for burglary and 5 to 15 years for arson, sentences to be concurrent.

The Emmons' next-door neighbor testified that she saw two men on fire emerge from the house just after she heard two explosions at about 10:00 p.m. on the night in question. (A. 48) [1] She could not identify petitioners. (A.

[1] "A." refers to Petitioners' Abstract filed in the Appellate Court.

49) Petitioners were badly burned at about the same time as the fire. (A. 58, 51, 105-06) Petitioners presented evidence to explain their whereabouts at and shortly before the time of the Emmons' fire, which placed them too far from that location to have been there at the time of the fire, and further, to explain how they happened to be burned that night while trying to assist a man start his car, which exploded and burned them. (A. 97-106)

The evidence adduced at trial is fully set forth in the Appellate Court's opinion (App. A pp. 1-5, 11) and is not repeated herein to avoid unnecessary duplication. Specific facts will be referred to during the course of this Petition where necessary and pertinent.

REASONS FOR GRANTING THE WRIT

1.

Petitioners' convictions are so lacking in evidentiary support as to render said convictions violative of due process of law.

> "Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re Winship*, 397 U.S. 358, 364.

Moreover, this Court has definitively held that a conviction devoid of evidentiary support is violative of due process of law. *Thompson* v. *City of Louisville*, 362 U.S. 199, 204. See also *Gregory* v. *City of Chicago*, 394 U.S. 111, 112; *Johnson* v. *Florida*, 391 U.S. 596, 598.

We submit that lack of evidence against petitioners in the case at bar renders their convictions violative of due process.

The *only* evidence tending to show that petitioners may have been involved with setting the fire at the Emmons' home was the fact that petitioners were badly burned at about the same time as the fire.[2] (A. 48, 51, 105-06) All

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[2] That blood type A was discovered on corn leaves found near the crime scene, while blood of this same type was found on clothing taken from both petitioners at the hospital (A. 72, 74-76), is inconclusive, inasmuch as over 40% of the population has blood type A. (A. 73)

That gasoline was found on carpet remnants from the Emmons' home (A. 57, 70) is of no moment to petitioners' position, since they do not contest that an arson occurred; they merely dispute their connection with any such arson.

the other evidence which one would expect to point to their guilt, if they in fact were guilty, pointed in exactly the opposite direction. Soil samples from petitioners' shoes did not match soil from the scene of the arson (A. 72, 79); fibers of clothing found at the scene did not match fibers from the petitioners' clothing (A. 70-71, 77); no fingerprints were found on a flashlight and prybar found at the scene (A. 61); and footprints from the scene failed to match petitioners' footprints. (A. 61)

Petitioners presented evidence to explain their whereabouts at and shortly before the time of the Emmons' fire, which placed them too far from that scene to have been there at the time of the fire. (A. 97-106) They explained that they were burned while trying to help a man start his car, which exploded when outboard motor fuel was put into the carburetor. (A. 100-106) This was corroborated by the testimony of Sylvia Armstrong—not related to or a close friend of either petitioner—who saw petitioners in the tavern, in a different county than Emmons' home, and saw both petitioners leave between 9 and 9:20 p.m. in the company of a longhaired man whom she did not know. (A. 97-99) It was this man, according to Schabatka's testimony, whose car petitioners were trying to start. This was also corroborated by the fact that a burned station wagon was in fact found in the vicinity where petitioners said it would be (A. 93-96), and by testimony of the car dealer who sold such a car to a man fitting the description given by Schabatka and Ms. Armstrong, who gave his name as Ralph Johnson, the name the man gave petitioners. (A. 92, 98-99, 101)

It is clear that petitioners stand convicted because, and *only* because, they had the grave misfortune to be burned in a fire at approximately the same time as the Emmons'

fire. The Emmons' next-door neighbor testified that two men on fire ran out of the house just after she heard two explosions at about 10 p.m. on the night in question. (A. 48) She could not identify petitioners. (A. 49)

While it must be conceded that whoever ran out of that house on fire would have been burned, it may not be assumed on the other side of the coin that anyone burned at about the time of the fire must have been burned in that particular fire—especially where, as here, petitioners presented a plausible, corroborated explanation of how they came to be burned. Their convictions must not be permitted to stand, based, as they obviously are, only on probabilities.

The use of "probabilities" or "possibilities" to convict, absent direct evidence of guilt, has soundly been condemned by the courts in *People* v. *Collins*, 66 Cal. Rptr. 497, 438 P.2d 33 (1968), and *State* v. *Holt*, 17 Ohio St. 2d 81, 246 N.E.2d 365 (1969). See also Tribe, *Trial by Mathematics*, 84 HARV. L. REV. 1329 (1971). In Illinois, such cases as *People* v. *Galan*, 110 Ill.App.2d 98, 249 N.E.2d 118, 119 (1 Dist. 1969), and *People* v. *Jackson*, 23 Ill.2d 360, 178 N.E.2d 329 (1961), require reversal where a conviction—as here—is based upon suspicious circumstances and probabilities rather than upon proof.

The Appellate Court's conclusion that the evidence proved petitioners' guilt beyond a reasonable doubt (App. A pp. 13-14) simply is not supported by this record.

Petitioners stand convicted upon a record so devoid of evidentiary support that their convictions are violative of due process of law. In accordance with principles heretofore enunciated by this Court, certiorari should be allowed, and petitioners' convictions should be reversed for total failure of the evidence to establish their guilt of the crimes of burglary and arson.

2.

Petitioners were precluded from presenting their theory of defense to the jury, in violation of their due process rights.

A. Refusal to instruct on the defense of alibi.

B. Exclusion of evidence of petitioners' out-of-court statements.

Fundamental fairness as embodied in the due process clause of the Fourteenth Amendment demands that a defendant in a criminal case be permitted to have his theory of the case, together with evidence supportive thereof, properly submitted to the jury for decision.

While not deciding the exact issue, this Court has spoken on a similar issue, with language supportive of petitioners' position. In *Holt* v. *Virginia*, 381 U.S. 131, this Court for the first time held that compulsory process for defense witnesses (an essential portion of Sixth Amendment right to confrontation) must be provided in state criminal proceedings as a requirement of due process. As part of its rationale for so holding, this Court stated:

> "[D]ue process guarantee[s] a defendant . . . 'an opportunity to be heard in his defense — a right to his day in court — . . .' The right to be heard must necessarily embody a right to raise relevant issues." 381 U.S. at 136.

Such constitutional right to "raise relevant issues" and "to be heard in his defense" must necessarily also include the right to have the jury properly instructed as to the law applicable to those issues, and the right to have the jury hear and consider evidence relevant thereto, in order fully to exercise that right recognized in *Holt, supra. Cf. Washington* v. *Texas*, 388 U.S. 14.

In the case at bar, petitioners were precluded from effectively exercising their right to have their theory of defense fully and fairly presented to the jury, and hence, were deprived of a fair trial because the trial court refused to instruct the jury upon their alibi defense, and excluded from evidence certain out-of-court statements, made by petitioners, corroborative of their alibi defense.

A.

The trial court refused to instruct the jury pursuant to petitioners' requested instructions 4 and 11.[3] The Appellate Court approved the trial court's refusal to give these instructions because other instructions which were given served, in that court's opinion, adequately to instruct the

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[3] The refused instructions are as follows:

4. The Court further instructs the jury that in this case the Defendants have made the defense of what, in law is called an alibi; that is, that at the time the offense charged in the Indictment is alleged to have been committed that the Defendants were not at the place where the crime was committed but were elsewhere. And the Court instructs you that it is not necessary that the Defendants prove their alibi beyond all reasonable doubt, but if, considering the evidence of the alibi, together with all other evidence in the case you have any reasonable doubt of the Defendants' guilt, then you should acquit them. (A. 27)

11. In every criminal case, the accused have the right to advance any theory of their defense, but in order to be entitled to an acquittal the Defendants are never required to prove their theory of the defense beyond a reasonable doubt, nor even to the satisfaction of the jury. The burden is upon the People to establish their guilt beyond every reasonable doubt, and if, after considering the evidence introduced by the Defendants in connection with all the other evidence, the jury have a reasonable doubt of the Defendants' guilt, they cannot be convicted. (A. 28)

jury on burden of proof, the effect of circumstantial evidence, and the requirement of proof of defendants' guilt beyond a reasonable doubt, (I.P.I. Crim.[4] Nos. 2.03, 3.02, 15.02, and 14.06), and because that court in a recent case, *People* v. *Hawkins*, 4 Ill.App.3d 471, 281 N.E. 2d 72 (3 Dist. 1972), held that alibi instructions need not be given. (App. A pp. 7-8)

The Appellate Court erroneously concluded that other instructions adequately covered the substance of these instructions; clearly no instruction which was given (see A. 21-30) covered the subject of the burden of proof regarding a defense raised by petitioners. Moreover, the *Hawkins* case, *supra*, was not decided on the basis of a considered judgment by the court that no alibi instruction was therein required to insure a fair trial, but rather, was based merely on the Committee Comments to I.P.I. Crim. No. 24.05 that no instruction on alibi should be given, and on *People* v. *Poe*, 48 Ill.2d 506, 272 N.E.2d 28 (1971), approving the Committee's recommendation and affirming though no alibi instruction was given.

The fundamental right to have submitted to the jury any theory of the defense raised by evidence in the record has long been recognized. See, *e.g.*, *United States* v. *Phillips*, 217 F.2d 435, 440-41 (7 Cir. 1955); *Calderon* v. *United States*, 279 Fed. 556, 558 (5 Cir. 1922); *United States* v. *Grimes*, 413 F.2d 1376, 1378 (7 Cir. 1969). The federal courts are similarly in accord with the principle that where the evidence raises an alibi defense, the jury must be instructed as to the government's burden of proof concerning the alibi. Both federal manuals on criminal jury in-

[4] "I.P.I. Crim." refers to Illinois Pattern Jury Instructions (Criminal).

structions contain such an instruction. MATHES & DEVITT, FEDERAL JURY PRACTICE AND INSTRUCTIONS, sec. 8.27, at 110 (1965); LABUY, JURY INSTRUCTIONS IN FEDERAL CRIMINAL CASES, sec. 5.01, at 25 (1965). See, *e.g.*, *United States* v. *Marcus*, 166 F.2d 497, 503-04 (3 Cir. 1948); *United States* v. *Barrasso*, 267 F.2d 908, 910-11 (3 Cir. 1959); *Goodall* v. *United States*, 180 F.2d 397, 401-02 (D.C. Cir. 1950).

Similarly, prior to the Illinois Supreme Court's decision in *People* v. *Poe*, 48 Ill.2d 506, 272 N.E.2d 28 (1971), Illinois courts had recognized a fundamental right to have the jury instructed on any defense theory of the case supported by any evidence, *People* v. *Matter*, 371 Ill. 33, 20 N.E.2d 600, 602 (1939); *People* v. *Lefler*, 38 Ill.2d 216, 230 N.E.2d 827, 830 (1967), and had specifically applied this doctrine to alibi cases. Where any evidence supported defendant's theory of alibi, a requested instruction concerning the law applicable to such evidence, particularly concerning the State's burden of establishing a defendant's presence at the scene of the crime beyond a reasonable doubt, was absolutely required. *People* v. *Scott*, 401 Ill. 80, 81 N.E.2d 426, 429-30 (1948); *People* v. *Collins*, 49 Ill.2d 179, 274 N.E.2d 77, 82-83 (1971).

We are not suggesting that any particular form of alibi instruction is required by due process. What we are submitting is that where, as here, evidence of alibi is in the record, and where, as here, defense counsel requested an alibi instruction,[6] fundamental fairness requires that such evidence properly be submitted to the jury as petitioners' theory of the case, together with a proper statement of applicable law concerning the prosecution's burden of

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[6] See *Naughton* v. *Cupp*, 476 F.2d 845, 846 n.1 (9 Cir. 1973), reversed by *Cupp* v. *Naughten*, 414 U.S. 141.

proof as to that issue. To give no instruction whatever concerning alibi where the evidence supports this defense amounts to denial of petitioners' due process right to have their theory of the case properly presented to the jury.

It must be remembered that laymen tend to view alibi evidence with great distrust and skepticism.[6] Without being advised specifically that the alibi evidence could be sufficient in law to raise a reasonable doubt of petitioners' guilt, the jury may not have realized this.

We submit that in this case failure to instruct on the defense of alibi at all was as repugnant to due process as giving such erroneous instructions as were stricken by the federal courts in such cases as *Stump* v. *Bennett*, 398 F.2d 111 (8 Cir. 1968); *Johnson* v. *Bennett*, 414 F.2d 50 (8 Cir.

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[6] For example:

"Alibi

In law an *alibi*—technically 'being elsewhere'—is the plea that a person accused of a crime could not have committed it because he was someplace other than at the scene of the crime when it was committed.

In popular usage, *alibi* usually carries with it the implication that there is something spurious about the explanation given. We speak of a person trying to alibi his way out of an embarrassing situation. *Alibi* also, as Webster's *Dictionary of Synonyms* puts it, 'implies a desire to shift blame or avoid punishment.'

Of course a person can give an 'excuse' in his desire to shift blame or avoid punishment, and we often do exactly that. When, for instance, a child brings to school an 'excuse' from his parents for an absence from school, he is surely doing so to avoid punishment.

But because *alibi* has been so long and so widely used in its legal sense and since it carries with it an odor of wrongdoing that does not normally attach to 'excuse,' there is a valid distinction between the two words." MORRIS, DICTIONARY OF WORDS AND PHRASE ORIGINS, Vol. 1, at 8-9 (1962).

1969); *State* v. *Smith*, 321 F. Supp. 482, 488, 490 (N.D. Ga. 1970); *Smith* v. *Smith*, 454 F.2d 572 (5 Cir. 1972); and *Mathis* v. *Caldwell*, 455 F.2d 979 (5 Cir. 1972). *Cf. Screws* v. *United States*, 325 U.S. 91.

Giving no alibi instruction can be just as violative of due process of law as giving a faulty one, in that the jury is left to conjecture and surmise as to the treatment it should afford the alibi evidence, and the defendant's theory of the case, which he has a fundamental right to present to the jury, is in effect not presented at all. *Cf. Cutshall* v. *Tollett*, 318 F. Supp. 1330 (E.D. Tenn. 1970).

Proper alibi instructions are necessary in order to implement the presumption of innocence and the requirement of proof of guilt beyond a reasonable doubt. See *Smith* v. *Smith*, 454 F.2d 572, 578-79 (5 Cir. 1972). *Cf. Cool* v. *United States*, 409 U.S. 100; *Mullaney* v. *Wilbur*, ... U.S. ..... 39 L.Ed.2d 96.

We respectfully urge that the decision not to instruct on alibi evidence, based only upon a Committee's recommendation later adopted by the Illinois Supreme Court (*People* v. *Poe*, 48 Ill.2d 506, 272 N.E.2d 28 (1971)), operated to deprive petitioners of a fair trial as required by due process of law in that they were precluded from having their theory of the defense fairly submitted to the jury.

B.

During the State's case in chief, David Lowery testified as to the circumstances of his having received a phone message at work and having gone to petitioner Schabatka's house, finding both petitioners badly burned. He also testified to how petitioners were transported to the hospital. (A. 51-53) On cross-examination, when defense counsel at-

tempted to adduce from Lowery statements made to him by petitioner Dean en route to the hospital, at a time when Lowery, who had training in military service concerning burn shock and treatment, (A. 52) testified that Dean was suffering from burn shock and was "coming and going—not really conscious," (A. 52), the court sustained the State's objections that the question went beyond the scope of the direct examination, since no conversations were gone into on direct. (A. 52-53) Defense counsel expected Lowery's answer to be that Dean had said, "My God, that fire, the car blew up." (App. A p. 11)

Accordingly, the defense called Lowery as its own witness and again attempted to have him testify to his conversation with Dean at approximately 10:20 or 10:30 on the night in question. (A. 87-88) The State's objection was again sustained, this time on the theory that the conversation was violative of the hearsay rule.

Similarly, the defense was prevented from having Sgt. Larry Layer testify on cross-examination to conversations he had with both petitioners at the hospital about 1:45 a.m. that same night. (A. 61-62) Layer had testified on direct concerning his observations of petitioners, his collection of their clothing, etc. (A. 60) The objection was sustained on the basis that it went beyond the scope of direct. (A. 62)

The Appellate Court sustained the trial court's rulings preventing the jury from hearing what petitioners told Lowery and Layer as to the circumstances of their getting burned on the basis that the hearsay rule precluded their admission, and that the statements did not qualify for exception to that rule as spontaneous or excited utterances. (App. A pp. 11-12)

In order to implement the fundamental right to have their defense theory presented to the jury, (See pp. 8-13, *supra*), petitioners necessarily also had the right to have

the jury hear and consider all relevant evidence corroborative of their defense theory. See *Washington* v. *Texas*, 388 U.S. 14. The trial and appellate courts' erroneous application of the hearsay rule to preclude admission of the proffered out-of-court declarations of petitioners, corroborative of their alibi defense and explaining how they came to be burned, operated to deprive petitioners of a fair trial in violation of due process of law.

(i) *The statements were properly admissible under the "spontaneous declarations" exception to the hearsay rule.* Because petitioner Dean was in shock and semi-conscious (A. 52), even though some time elapsed between the time of the fire and the time of Dean's statement to Lowery, there was "no opportunity for reflection or invention" or for "premeditation" by Dean due to his mental and physical condition; and similarly, in his "physical state," he had "neither the opportunity nor the probability of fabrication, calculation or deliberate design." Hence the out-of-court statements sought to be admitted should have been admitted under the spontaneous declarations exception to the hearsay rule. See, *e.g.*, *People* v. *Poland*, 22 Ill. 2d 175, 174 N.E.2d 804, 807 (1961); *People* v. *Parisie*, 7 Ill.App.3d 1009, 287 N.E.2d 310, 320-23 (4 Dist. 1972).

(ii) *Alternatively, such statements were admissible, inasmuch as the hearsay rule was not properly applicable,*[7] *because:*

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[7] While petitioners raised this alternative argument, both at trial (A. 89-90) and on appeal (Def. Br. pp. 32-35), the Appellate Court did not indicate that this matter was considered on appeal, and did not rule thereon; its ruling was only based on its conclusion that the proffered statements did not come under the "spontaneous utterances" exception to the hearsay rule. (App. A pp. 11-12)

(a) The statements were not offered to prove the truth of their contents, but merely to prove the fact that they were made;

(b) The hearsay rule does not apply where, as here, the declarants (here, petitioners) were in court and subject to cross-examination.

The proffered statements were sought to be admitted, not to prove the truth of the matter stated, but merely to prove that the statements were made by petitioners. Thus, the proffered evidence (as to Dean's statement to Lowery, and as to statements by both petitioners to Sgt. Layer) was not hearsay at all, and was admissible without reference to any exceptions to the hearsay rule. See, *e.g., People* v. *Carpenter,* 28 Ill.2d 116, 190 N.E.2d 738, 741 (1963).

Due process required that petitioners be entitled to have the jury consider the fact that, shortly after they were burned, each made statements to the effect that they were burned when a car "blew up," not to prove that this in fact happened, but to prove that they made such statements at once, rather than fabricating such testimony at trial. The fact that they made the statements to Lowery and Layer, if admitted as evidence, could have corroborated their defense at trial, and might have meant the difference between conviction and acquittal.

Similarly, since petitioners were in court and available for cross-examination, the main reason for applicability of the hearsay rule simply does not exist. See, *e.g., People* v. *Carpenter, supra,* 190 N.E. 2d at 741-42; *People* v. *Cook,* 33 Ill.2d 363, 211 N.E.2d 374, 378 (1965). The rationale of those cases, wherein testimony which ordinarily would be considered inadmissible hearsay was admitted where the declarant was in court and subject to cross-examination, dictates that the proffered statements by petitioners herein should similarly have been admitted as evidence.

This same rationale has been recognized by this Court, for the reversible error in *Bruton* v. *United States*, 391 U.S. 123, arose because the declarant (co-defendant) did not testify and could not be subjected to cross-examination. *Id.* at 136. The Court further noted that the reason for requiring exclusion of such testimony (*i.e.*, co-defendant's out-of-court statements implicating defendant) under the constitutional confrontation clause is the same as the reason for excluding such evidence under the hearsay rule. *Id.* at 136 n.12. And in *California* v. *Green*, 399 U.S. 149, 161, this Court explained that the traditional exceptions to the hearsay rule permit introduction of evidence *despite absence of the declarant*—in the case at bar, of course, declarant is not "absent"—and noted that the *Bruton* rule requiring severance was not applicable where the declarant (co-defendant) testifies at trial and is subject to cross-examination. *Id.* at 163-64.

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Petitioners respectfully submit that the trial and appellate courts' rationale for excluding the proffered evidence pertinent to their alibi defense does not constitute an independent State ground sufficient to justify such exclusion. Petitioners' due process rights were violated by their being prevented from bringing this relevant evidence, pertinent to their theory of defense, to the jury's attention. Such rulings effectively precluded petitioners from having the jury give full and fair consideration to their alibi defense, just as surely as did the trial court's refusal to instruct on alibi at all.

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Certiorari should be granted so that this Court may definitively express itself that a defendant in State criminal proceedings has a right to present his theory of defense to the jury; that such right is part and parcel of

due process of law; and that in the factual context of the case at bar (See Point 1, *supra*, pp. 5-7), refusal to instruct on alibi and exclusion of petitioners' out-of-court statements corroborative of their alibi rendered their trial fundamentally unfair in violation of due process of law.

CONCLUSION

Petitioners request that this Court issue a writ of certiorari to review the judgment of the Illinois Appellate Court.

Respectfully submitted,

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Attorneys for Petitioners

APPENDIX

APPENDIX A

Opinion of the Appellate Court

Mr. Justice Dixon delivered the opinion of the Court:

The defendants Chester Schabatka and Norburn Dean were found guilty by a jury of burglary and arson. The Circuit Court of Tazewell County sentenced Dean to imprisonment for not less than 5 nor more than 10 years for burglary and not less than 5 nor more than 15 years for arson. Sentences to be concurrent. Schabatka was sentenced to not less than 2 nor more than 5 years for burglary and for not less than 5 years nor more than 10 years for arson. Sentences to be concurrent. Both defendants appeal contending that that jury was not properly instructed; that they were denied equal access to discoverable material and other physical evidence; that they were denied the right to have the jury consider certain evidence; and that the record does not establish their guilt beyond a reasonable doubt.

On July 23, 1971 James Emmons and wife Ann, were buying a home at 115 Fifth Street, South Pekin, Illinois. They had occupied the house for about a year but on July 23 they were on vacation visiting a relative in Omaha, Nebraska. No one had been given permission to live in their home during their absence but they had asked Debbie Davison, a neighbor girl 15 years old, to watch the house and take care of their dog. The house contained an oil furnace and a gas stove on which pilot lights were burning. On learning of a fire in their home they returned and discovered the house "gutted" but "nothing missing." The contents and the house were insured and the full amount of insurance was paid by their insurance company. Neither knew either defendant and had no dealings with them.

At about ten o'clock on the night of July 23, 1971, Debbie Davison was at her home with her mother and sister. The Emmons home was about 100 feet away. Debbie heard glass breaking, looked out her window and saw figures of two men at the back door of the Emmons home. She did not see what they were doing; it was dark and they were standing up. One of the figures had on a white T-shirt and the other had dark clothing. One was tall and one comparatively short. After watching about 2 minutes she left the window and called the police. When Debbie returned to the window there were two explosions; she saw one person "fly out of the house" and the other one came running out. Both were on fire and they began rolling in the grass. It was not light enough for her to see the faces and she could not identify the men.

David Lee Lowery, a friend of defendants, was working the four o'clock to midnight shift at American Distillery in Pekin on July 23, 1971. At around ten o'clock that night he received a note requesting he call the telephone number of defendant Schabatka. He called Schabatka at his home, checked out of work and drove to Schabatka's home where he found both defendants burned "pretty bad." When he first saw defendants, Schabatka was wearing a bathrobe, and Dean's clothing was mostly "burned off—he had not much of anything on—nothing that I can say what color." At this time Schabatka was conscious but Dean was in shock, "coming and going—not really conscious." Lowery administered first aid (he had had army training for burns in crash rescue). He telephoned Jim Clark, requesting assistance in transporting defendants to hospital, and, when Clark arrived, the defendants were placed in Lowery's car. He decided to take defendants to St. Francis Hospital in Peoria rather than to the nearby Pekin hospital because his mother was employed at the

St. Francis emergency room. At Creve Coeur the car was stopped for speeding by local police who called an ambulance and who then escorted the car until the ambulance was intercepted in East Peoria and defendants transferred to the ambulance for the remainder of the trip.

Larry Layer, a Sergeant in the Sheriff's department who was on duty at the time of the fire, made plaster casts of footprints found in the area. He found burned clothing at the scene, a flashlight, a small pry bar and corn leaves containing blood stains. He went to St. Francis Hospital emergency room where he took both defendants' clothing (no T-shirt) and shoes and certain cotton swabs. As a result of what defendants told him he "had patrol cars check for a burned station wagon."

The blood on the corn leaves was type A. Defendant Schabatka had type A, but so do about 40% of the population. Scientific analysis disclosed that the fabric of clothing found at the scene, could not have originated from the clothing taken at the hospital, the soil removed from defendant's shoes "failed to reveal a sufficient number of areas of similarity to indicate a common source; no fingerprints were found on the flashlight and pry bar; and the casts of the footprints at the scene did not match with shoes of either defendant taken from the hospital.

An arson investigator inspected the Emmons home on August 12, 1971. He detected the odor of gasoline on carpet samples, concluded that the fire was started by an accelerant and that gasoline fumes could have been ignited by the pilot light on the gas stove.

James A. Flynn, a criminologist, scientifically analyzed the carpet samples, defendant's clothing and the cotton swabs all of which he stated contained gasoline vapors.

The first witness for the defendants, Wayne Werchez testified that he had a small used car business and that in July 1971 he sold an old red Dodge or Plymouth station wagon to a Ralph Johnson for $50 or $75. Johnson was a "kind of hippy type fellow with long hair and whiskers."

Donald Barth testified that on July 25, 1971 he saw a red 1960 Dodge station wagon that had been badly burned. The tires and radiator was on it. The car was behind a slag pile off the traveled portion of a gravel road about a half mile south of LaMarsh Creek Road. He notified the Sheriff's department.

Robert DuBois, a crime scene technician went to the car on July 26, 1971. He photographed and took debris samples from the interior. The debris samples were negative as to the presence of any accelerant. When he saw the car, the front tires and the radiator were missing. There was no battery in the car and there was no residue of any plastic or battery material having melted in the area.

William Bond testified that both defendants were working on Dean's house when he left them at 8:30 on evening of July 23, 1971.

Sylvia Armstrong testified that she saw defendants arrive at Tony Baker's tavern in Mapleton, Peoria County at between 8:45 and 9. She saw them leave between 9 and 9:30 P.M. with a man about 30 to 35 years old who had long hair and was wearing glasses. Defendants were wearing pants and shirts but she didn't really pay that much attention. They were not in the tavern "too long."

Defendant Schabatka testified that about 8:30 he and Dean left Dean's house and drove 4 or 5 miles across the river to Tony Baker's tavern arriving at about 8:40. While there, this stranger, a hippie type with long hair asked

Dean to help him get his car started. Defendants agreed to "give the guy a hand." They all left the tavern about 9:15 to 9:20 P.M. On the way to the car the guy said his name was Ralph Johnson. After driving about 5 minutes they came upon Ralph Johnson's car. After trying unsuccessfully to get the car started they determined it needed gas to be poured into the carburetor. In the wagon there was an outboard motor containing gas and an empty can. The outboard's gas was poured into the can. Dean then poured gas into the carburetor, shut the hood, came around the car, sat in the seat beside Schabatka and said "OK try that." Johnson stood right beside the driver. Both doors were open. Schabatka then tried to start it and the car exploded, flames shot from everywhere. He testified, "Well, I blowed out of the car and I was all on fire, completely on fire seemed like at the time." His clothes were on fire and he got the fire out and then he got Dean and drove home (about 5 miles). He did not know what became of Johnson as he never saw him again after the explosion. At home, "We took off the clothes what was left." He put on a bathrobe. At home his wife was too shaken to drive defendants to hospital so he called his buddy David Lowery. At the hospital when he talked to the police he was not in his right mind. He was burned from the waist down, had some burns on his arms and had a cut requiring stitches on one of his arms.

The defense contends initially that the jury was not properly instructed in that the court, over objection, gave I.P.I. Criminal No. 3.04 and refused defendants' tendered instructions 3, 4 and 11 which were not in I.P.I.

I.P.I. 3.04 reads, "Motive is that which prompts a person to act. The State is not required to prove a motive for the commission of the crimes charged."

Defendants concede that the cases cited by the Committee hold that motive is not an essential element of proof in a criminal case but seizes on the exception "Accordingly, if the People adduce evidence tending to prove a motive and the prosecutor argues the circumstance of motive to the jury, this instruction should *not* be given." Defendants further concede that nothing was adduced in the evidence concerning motive, except inferentially, in the testimony of James Emmons that he did not know the defendants and had never had anything at all of any kind, character or nature to do with them. We do not agree that such evidence was designed to show motive for this arson and we do not believe that under the circumstances of this case such instruction constituted error.

Defendants' tendered Instruction 3:

> Your personal opinions as to the facts not proven cannot properly be considered as the basis for your verdict. You may believe as men and women that certain facts exist, but as jurors you can only act on the evidence introduced upon the trial, and from that and that alone you must form your verdict, unaided, unassisted and uninfluenced by any opinions or presumptions not formed upon the evidence.

Instructions that are out of keeping with the general purposes endorsed by the Supreme Court in the publication of Illinois Pattern Jury Instructions because they are * * * repetitious or otherwise inconsistent with those purposes, are not to be given even though they may be a correct statement of the law and though their use has been approved in the past. *Bulleri* v. *Chicago Transit Authority*, 41 Ill. App. 2d 95. I.P.I. Criminal 1.01 was given and Paragraph 3 contains a "very good statement of the law." *Eckels* v. *Hawkinson*, 138 Ill. App. 627, 633-4. See Comment to I.P.I. Civil 2d 1.01.

Defendants' tendered Instruction 4:

> The Court further instructs the jury that in this case the defendants have made a defense of what, in law is called an alibi; that is, that at the time the offense charged in the Indictment is alleged to have been committed that the defendants were not at the place where the crime was committed but were elsewhere. And the Court instructs you that it is not necessary that the defendants prove their alibi beyond all reasonable doubt, but if, considering the evidence of alibi, together with all other evidence in the case you have any reasonable doubt of the defendants' guilt, then you should acquit them.

I.P.I. Criminal 2.03 and 3.02 were given. This court recently held that it was not error to refuse to give an instruction on the subject of alibi. *People* v. *Hawkins,* 4 Ill. App. 3d 471.

Defendants' tendered Instruction 11:

> In every criminal case, the accused have the right to advance any theory of their defense, but in order to be entitled to an acquittal the Defendants are never required to prove their theory of the defense beyond a reasonable doubt, nor even to the satisfaction of the jury. The burden is upon the People to establish their guilt beyond every reasonable doubt, and if, after considering the evidence introduced by the Defendants in connection with all the other evidence, the jury have a reasonable doubt of the Defendants' guilt, they cannot be convicted.

Again, I.P.I. Nos. 2.03, 3.02, 15.02, 14.06 were given and we find that the jury was adequately instructed on the burden of proof, the effect of circumstantial evidence, and the requirement of proof of defendant's guilt beyond a reasonable doubt. At defendants' request 2.03 was given in its entirety, the last paragraph provided:

> "You should not find the defendants guilty unless the facts and circumstances proved exclude every reasonable theory of innocence."

The defendant was not entitled to repetitious instructions. *People* v. *Richards*, 120 Ill. App. 2d, 313, 345.

Defendants next contend that they were denied equal access to discoverable material and other physical evidence.

On Feb. 25, 1972 defendants each filed identical motions for discovery the pertinent paragraphs being "d. Any reports of experts * * *." and "g. Any and all tangible evidence which the State has in its possession and control * * *."

On March 12 in response the State furnished an Exhibit 2 (not abstracted), stated that the People were unaware of any other reports at that time but stated, "If any other reports of experts reach the files of the State prior to trial of this cause, copies of the reports will be forwarded to the defendants through their counsel." The State stated that photographs of a 1960 Dodge Station wagon were in custody of Robert DuBois. Tangible items belonging to accused were listed and attached to Exhibit 3. The items and photographs were open to inspection by the defense.

On May 10, 1972 pursuant to a motion of the People stating that not all physical evidence sent to Illinois Crime Laboratory for analysis had been returned and analyzed, the Court entered an agreed order for continuance to June 26, 1972. The order recited that defendant counsel would desire an opportunity to examine such physical evidence and any analytical reports and was signed and approved by defense counsel.

On the morning of trial the defendants' attorney stating that he had received the analytical report of debris from the car and feeling that there may have been favorable evidence demanded an opportunity to examine the burned automobile. The People denied ever having had the car in their possession or control. They did not impound it and had no present or prior knowledge of its whereabouts since July 26, 1971. It had been examined on July 26, 1971 by Robert DuBois of the Illinois Department of Law Enforcement at the slag pile area off the road but never impounded. The State never intended to use the automobile as part of its case. Diligent good faith efforts had been made to locate the car. Defense counsel stated, "I'm satisfied that due to my request he communicated with the proper law officials as a result of which no one had any idea of the whereabouts of this automobile."

The defense has cited no cases and we are aware of none that would require a party who never had possession and control of an object to produce it. Supreme Court Rule 412 (Ill. Rev. Stat., ch. 110A, sec. 412) provides,

> "* * * the State shall, upon *written* motion of defense counsel, disclose to defense counsel the following material and information *within its* possession and control"; (emphasis supplied.)

Further, the Committee Comments say that the rule requires a specific request for disclosure because in many cases discovery may be neither necessary nor wanted and that, therefore the choice of discovery or no discovery is left to the discretion of defense counsel rather than making it automatic.

The defendants in this case were fully aware that the burned automobile might be a factor in their case yet at no time did they specifically request an independent inspection of the automobile until the eve of trial, almost one year after the event.

We do not believe that the failure to produce what was not available for production, in the absence of a deliberate suppression of evidence favorable to the defense, deprived the defendants of a fair trial.

When James A. Flynn, (the criminologist who examined and analyzed items for the presence of gasoline vapors) was called to the stand, the defense made a motion to exclude his testimony on the ground that a copy of his report had not been furnished to the defense. The Assistant State's Attorney claimed that he had long ago furnished a copy. Another copy had been given to the defense the previous evening. The report was short and could be read in two minutes. The trial judge denied the motion to suppress the testimony.

The order for continuance entered by the Court on May 10, 1972, approved and singed by defense counsel recited "* * * and counsel for the defendants advising the Court that defense counsel would also desire an opportunity to examine such physical evidence and any analytical reports as to same * * *." It is evident that counsel had some knowledge prior to trial. There was no wilful concealment by the State.

Supreme Court Rule 415(g) states that "* * * the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, exclude such evidence, or enter such other order as it deems just under the circumstances."

In the instant case the defense knew on March 14, 1972 that the State had the items of evidence and that they either had been or were going to be analyzed. Of course, the defendants should have been given a copy of the expert's report as soon as available, but by the same token,

they cannot wait until the second day of trial and now be heard to cry unfair trial. *cf. People* v. *Embry,* 12 Ill. App. 3d 332, 335.

When David Lee Lowery testified he was asked if he had a conversation with the defendants at Schabatka's house on July 23, 1971. He replied that he had at around 10:30 P.M. When asked to relate what was said an objection was made by the State and sustained by the Court. The defense made an offer of proof to the effect that Lowery would have said that Dean said, "My God, that fire, the car blew up."

In the same fashion Officer Lowery was not allowed to relate what the defendants told him at about 1:45 A.M. in the St. Francis emergency room as to how they got burned.

Defendants contend that the testimony should have been admitted as spontaneous or exicted utterances. The requirements for admissibility under this exception are :(1) the occurrence of an event sufficiently startling to produce a spontaneous and unreflecting statement; (2) absence of time to fabricate; and (3) the statement must relate to the circumstances of the occurrence. *People* v. *Poland,* 22 Ill. 2d 175. *People* v. *Parisie,* 5 Ill. App. 3d 1009; 287 N.E. 2d 310.

Statements made by an accused in a criminal case may be admitted as spontoneous declarations provided the necessary tests are met. *People* v. *McLaughlin,* 337 Ill. 259.

Requirement 3 would appear to have been met in the instant case. Was there then absence of time to fabricate? Was the statement spontaneous?

The rule does not give any precise test as to how much time must intervene. Nor would it be possible to establish

any such precise test. At any rate the tendency is to permit very little time to elapse before it will be held that the declaration is not spontaneous.

It also seems futile to attempt to put some limit on the distance the declarant has travelled before his declaration lacks the necessary spontaneity. Nevertheless, if he has travelled from one geographic spot to another since the event, it is usually held that such travel has deprived his declaration of spontaneity. Hunter, Trial Handbook for Illinois Lawyers, 4th Ed. Sec. 66.20; *Chicago Union Traction Co.* v. *Lowenrosen,* 125 Ill. App. 194, aff'd 222 Ill. 506; *Ohio & M.R. Co.* v. *Cullison,* 40 Ill. App. 67; *People* v. *Wilson,* 401 Ill. 68.

Held not to be spontaneous when the declarant has been removed to the hospital, *Sullivan* v. *Henry Guth & Co.,* 148 Ill. App. 538, or otherwise removed from the scene of an accident, *Levy* v. *Morand Bros.,* 185 Ill. App. 266.

Each case must be decided on its own facts and the trial court is clothed with a reasonable degree of latitude. If the trial court does not abuse its discretion in its determination of admissibility, the ruling will not be reversed on appeal *Turnbull* v. *Porter,* 55 Ill. App. 2d 374. The statements herein were not so intimately connected with the event as to indicate that they were made without premeditation or with no purpose of exculpation. The trial court properly excluded the objectionable testimony.

The defendants' last contention is that the evidence does not establish their guilt beyond a reasonable doubt. They first point to a discrepancy between police officer's report and Debbie Davison's testimony. The report stated that she had told the police that one of the subjects had a white T-shirt and was medium height and slender build and she could not give any description of the other. They cite

cases such as *People* v. *Bennett,* 9 Ill. App. 3d 1021 which stand for the proposition that, "Where the identification of a defendant is vague, doubtful and uncertain, the prosecution has not sustained its burden of proof and the conviction must be reversed."

It is well established in Illinois that minor omissions or discrepancies in description do not necessarily affect the validity of a description although they may affect the weight to be given the evidence. *People* v. *Bennett* supra. The description by Miss Davison of the crime was not intended to be an eye-witness identification of defendants, in fact she stated she could not identify the men. Under the circumstances, the point raised by defendants as bearing on the question of identification does not in fact, do so. It bears only on the credibility of Miss Davison as a witness.

Defendants further argue that the evidence which showed that the defendants had been badly burned somewhere, by some agency, under some circumstances at sometime around 10:00 on the night of July 23, 1971, though of probative value, cannot substitute for proof and that probabilities are not enough to convict.

It is true that the evidence against the defendants is mostly circumstantial, but the law makes no distinction between direct and circumstantial evidence which have the same legal weight and effect. *People* v. *Robinson,* 14 Ill. 2d 325, 331. It has been held many times that circumstantial evidence which produces a reasonable and moral certainty that the accused committed the crime is sufficient to justify a conviction. *People* v. *Schulewitz,* 87 Ill. App. 2d 331, 337. The principle is well settled that the guilt of defendant may be established entirely by circumstantial evidence and it is "* * * necessary only that the proof of circumstances must be of a conclusive nature and tenden-

cy leading, on the whole, to a satisfactory conclusion and producing a reasonable and moral certainty that the accused and no one else committed the crime." *People* v. *Marino*, 44 Ill. 2d 562. Application of these principles to the instant case leads convincingly to the conclusion that guilt has been proven beyond reasonable doubt.

The judgment of the Circuit Court of Tazewell County is affirmed.

Judgment affirmed.

SCOTT, P.J. *concurs*
STOUDER, J. *concurs*

April 17, 1974

APPENDIX B

Order of the Illinois Supreme Court

CLERK OF THE SUPREME COURT
Springfield, Illinois

Sept. 27, 1974

No. 46784—People State of Illinois, respondent, vs. Chester Schabatka, et al., petitioners. Leave to appeal, Appellate Court, Third District. Denied.